IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 262 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAGHUBHAI SURABHAI BHARWAD

Versus

SATISHKUMAR RANCHHODDAS PATEL

Appearance:

1. Criminal Revision Application No. 262 of 1995
MR JM PANCHAL for Petitioner No. 1
MR PK JANI for Respondent No. 1
Mr.S.J.Dave, A.P.P. for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 17/03/2003

CAV JUDGEMENT

1. The petitioner abovenamed has filed the present

Revision Application under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973, in order to challenge the judgment and order dated 19-6-1995 recorded by the learned Additional Sessions Judge, Ahmedabad (Rural) at Mirzapur in Criminal Appeal no.16/1994 confirming the judgment and conviction order dated 6-6-1994 recorded by the learned Judicial Magistrate, First Class, Ahmedabad (Rural) at Mirzapur in Criminal Case no.47/1992 under which the learned Magistrate had convicted the present petitioner for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to suffer S.I. for six months and to pay fine of Rs.25,000/-, and in default of payment of fine, to further undergo S.I. for three months and also to pay compensation of Rs.22,000/-.

2. The first respondent had filed the aforesaid criminal case before the aforesaid Court stating that the petitioner was required to pay an amount of Rs.23,000/to the first respondent and with a view to satisfy the said due, the petitioner had issued a cheque of Rs.22,000/dated 5-12-1991. Further details are as follows:

1. 5-12-1991 Date of cheque of Rs.22,000/-.

2. 6-12-1991 Presentment and dishonour of cheque.

3. 12-12-1991 Second presentment.

4. 17-12-1991 Second dishonour of cheque.

5. 18-12-1991 Statutory notice.

6. 10-1-1991 Complaint

3. The first respondent contended before the trial Court that the cheque was dishonoured twice and yet the petitioner did not pay the said amount to the first respondent despite notice as aforesaid, and therefore, the said complaint was filed.

4. After going through the prescribed procedure, the learned Magistrate found the petitioner guilty for an offence punishable under Sec.138 of the said Act and inflicted the aforesaid punishment.

Feeling aggrieved by the said judgment and conviction order of the trial Court, the petitioner preferred Criminal Appeal no.16/1994 unsuccessfully.

Hence, this Revision.

5. In the present Revision Application, it has been mainly contended that the Sessions Court had dismissed the appeal on merit in absence of the petitioner and his Advocate, and therefore, the said dismissal is ex facie illegal, and therefore, the matter is atleast required to be remanded to the Sessions Court for fresh hearing. It is also contended that the notice and the complaint were not within the limitation prescribed, and therefore, the conviction cannot be sustained. That therefore, the present Revision be allowed and the conviction and sentence imposed on the petitioner be set aside.

6. After the Revision was filed, Rule was issued and it was duly served upon the respondents. The first respondent is being represented by Mr. P.K. Jani and the second respondent is being represented by Mr. S.J.Dave,Addl.P.P.

7. I have heard the learned Advocates for the parties and have perused the papers. As stated above, it was the case of the first respondent that an amount of Rs.23,000/- was due to the first respondent by the petitioner, and therefore, the petitioner had issued a cheque of Rs.22,0000/- on 5-12-1991 and it was dishonoured twice on 6-12-1991 and 17-12-1991, and therefore, the statutory notice was issued on 18-12-1991, and since it was not complied with, complaint was filed on 10-1-1992. These facts are not very much in dispute.

8. Learned Advocate for the petitioner has contended that before the Sessions Court, the petitioner could not remain present and his Advocate was also not present, and therefore, the learned Additional Sessions Judge had disposed of the said appeal in absence of the petitioner and his Advocate.

9. Paragraph 5 of the judgment at page 9 clearly shows that the petitioner and his Advocate both were absent though opportunity were given to them to appear and argue the matter, and therefore, the learned Judge went through the record and proceedings of the trial Court and heard the learned Advocate for the first respondent and disposed of the said appeal before him. These facts cannot be disputed at all.

10. Here, the learned Advocate for the petitioner has argued that a Criminal Appeal could not be disposed of on merit in absence of the Advocate of the appellant. In support of the said argument, he has relied upon a

decision of Dr.Jainendrakumar Vijaykumar Badjate v. State of Maharashtra, reported in AIR 1990 Supreme Court 1224. In paragraph 2 of the said judgment, the Honourable Supreme Court has observed as follows:

> "2. We find that Criminal Appeal No. 25 of 1986 has been decided without the learned counsel of the appellant (accused) who was appointed by the Court not being present. We do not wish to enter into the question as to why the Counsel was not present. That is a matter which can be considered by appropriate authorities, if they think fit. In the circumstances, however, we set aside the judgement of the High Court and direct that the Criminal Appeal No.25 of 1986 shall be heard afresh by the High Court. The appellant states that he will engage his own counsel at his own costs".

11. On the basis of the said judgment, the learned Advocate for the petitioner argued that this Court may allow the present petition and remand the matter back to the Sessions Court. He has also relied upon a decision of this Court in Amratbhai Lilabhai Desai v. State of Gujarat, reported in 2002 CRI.L.J. 2765. However, it seems that the aforesaid judgement of this Court was disposed of on the strength of the decision of Jainendrakumar (Supra). Therefore, it would not be necessary to refer to the aforesaid judgment of this Court.

12. Similar view was adopted in Ajay v. State of Haryana, reported in 2002 Supreme Court Cases (Cri) 1277. There also, the matter was remitted for fresh disposal. At the same time, the learned Advocate for the contesting respondent has relied upon a decision of the Honourable Supreme Court in Bani Singh and others v. State of U.P., reported in AIR 1996 Supreme Court 2439.

13. In the aforesaid decision, the Honourable Supreme Court was pleased to refer to the provision made in Section 385 of the said Code during the course of the judgment in paragraph 7. After discussing the provisions made in Sections 385 and 386 of the Code, the Honourable Supreme Court made following observations in paragraph 15:

> "15. Secondly, the law expects the Appellate Court to give a hearing to the appellant or his counsel, if he is present, and to the public prosecutor, if he is present, before disposal of

> the appeal on merits. Section 385 posits that if the appeal is not dismissed summarily, the Appellate Court shall cause notice of the time and place at which the appeal will be heard to be given to the appellant or his pleader. Section 386 then provides that the appellate Court shall, after perusing the record, hear the appellant or his pleader, if he appears. It will be noticed that S.385 provides for a notice of the time and place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the Pleader was also considered sufficient since he was representing the appellant. So also S.386 provides for a hearing to be given to the appellant or his lawyer, if he is present, and both need not be heard. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Ss. 385-386 of the Code. The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgement of the trial Court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to Court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present. If the lawyer is absent, and the Court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav's case (A.I.R. 1987 SC 1500) did not apply the provisions of Ss. 385-386 of the Code correctly when it is indicated that the Appellate Court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent".

14. On a bare perusal of the aforesaid observation of the Honourable Supreme Court, it is very clear that a Court may wait for an Advocate or a party and the Court may appoint an Advocate to defend the case of the

appellant in case the Advocate for the appellant is not present. However, it has also been made clear in the said judgment that it is not obligatory duty on the part of the Court to appoint Advocate to defend the case of the appellant in case the Advocate engaged by the appellant is absent.

15. While so observing the Honourable Supreme Court was required to consider a decision of the Honourable Supreme Court rendered in Ramnaresh Yadavs's case reported in AIR 1987 SC 1500. The Honourable Supreme Court observed that the said provisions were not applicable to Sections 385 and 386 of the Code.

16. The Honourable Supreme Court while dealing with the said issue, further observed in paragraph 16 as follows:

> 16" Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the Court issues a warrant for the appellant's presence. A compliant to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at state cost, he too would need the presence of the appellant for instructions and that would place the Court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the higher Court can remedy the situation if there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted."

17. Here, also we come across an experience when the appellant's Advocate remains absent, sometimes, an Advocate is appointed to represent the case of the appellant. He also remains absent, and another Advocate may be required to be appointed to represent the case of the appellant. If this process is going on and is permitted to go on, perhaps it would not be possible even for this Court to dispose of even a single Criminal Appeal. Moreover, when the Court appoints another Advocate at the cost of the State, then, the newly appointed Advocate would also require some time for

preparation and in the process, the matter will go on lingering. This is not the object of the provision made in Sections 385 and 386 of the Code.

18. The only observation relevant to the facts of the case on hand is that the Court should not dismiss a Criminal Appeal without examining the merits and demerits thereof. This would mean that a Criminal Appeal cannot be dismissed for want of prosecution simpliciter without examining the merits thereof.

19. In the present case, we find that the merits and demerits have been considered by the appellate Court by going through the records and proceedings with the assistance of the learned Advocate for the original complainant.

20. It is required to be considered that the two decisions cited by the learned Advocate for the petitioner were based on the aforesaid judgment of the Honourable Supreme Court rendered by the two Honourable Judges of the Supreme Court.

21. At the same time, the decision in Bani Singh and others v. State of U.P., reported in AIR 1996 Supreme Court 2439 is a decision rendered on 9-7-1996 by the three Honourable Judges of the Apex Court. It is well settled that when a judgment has been delivered by a Bench of the Honourable Supreme Court consisting of three Honourable Judges, then the said judgment will prevail over the judgment of the Honourable Supreme Court rendered by two Honourable of the said Court. In that view of the matter, the decision rendered in Bani Singh v. State of U.P., reported in AIR 1996 SC 2439, will be required to be followed by this Court, and I respectfully follow the same.

22. When Advocates cite a decision of a Court, they are expected to verify that the judgment which they refer or rely upon, is a judgment which has not been overruled or dissented from. It is also expected from them to verify that there is no other judgment rendered by a larger Bench. It seems that this precaution does not appear to have been taken while arguing the matter before this Court in Amratbhai Leelabhai Desai v. State of Gujarat, reported in 2002 CRI.L.J. 2765.

23. In view of the above position, it would not be very much necessary to discuss the decision rendered in the case of Ajay v. State of Haryana, reported in 2002 Supreme Court Cases (Cri) 1277.

24. On the aforesaid discussion, it has to be held that the Sessions Court was perfectly justified in disposing of the appeal on merit after perusing the records and proceedings and after hearing the learned Advocate for the original complainant. The judgment of the Sessions Court in Criminal appeal no.16/1994 cannot be treated to be illegal on the ground that the said Court need not appoint any Advocate to represent the case of the appellant-convict.

25. The learned Advocate for the petitioner has thereafter argued that sufficient time had not gone between the date of notice and the date of complaint, and therefore, there is patent illegality in convicting the present petitioner.

26. Now, so far as the service of notice is concerned, it has come on record that the notice was received and accepted by the wife of the present petitioner. This has been observed by the learned Additional Sessions Judge in paragraph 7 of the judgment. Even on verifying the record, the said fact cannot be disputed. This shows that the notice was duly served upon the present petitioner.

27. It has then been contended that the date of service of notice has not been proved. It is true that the date of service of notice has not been indicated on the postal acknowledgment, but it was the function of the person receiving the notice to place the date of receipt. Apart from the said position, it is also a matter on record that the first respondent-original complainant belongs to Ahmedabad, and his address is as follows:

Ganesh Traders,
Near Sapna Theatre,
Bavla Road, Sarkhej,
Ahmedabad.

28. It is also a matter on record that the that the petitioner original accused is also a resident of Ahmedabad and his residential address shown in the cause title is as follows:

Near Water Tank,
Fateh Wadi, Sarkhej,
Ahmedabad.

29. This shows that both the parties are residents of

Sarkhej area in Ahmedabad City. The notice was despatched on 18-12-91 and even if we take it that notice may have been served in a day or two, then also, the notice can be said to have been served on 20/21 December, 1991. The complaint has been filed on 10-1-1992. This shows that there was again a gap of fifteen days between the date of service of notice and the date of complaint, and therefore, the complaint could not be treated to be premature for any purpose.

30. No other argument has been advanced in the present petition. This shows that there is no merit in the present petition. On one hand the Sessions Court has not committed any illegality in dismissing the appeal in absence of the petitioner's Advocate and on the other hand, the complaint was not premature in the light of the background of the above discussion. Then, so far as the service of notice is concerned, the postal acknowledgment is on record and it proves that the notice was received and accepted by the wife of the petitioner on account of his absence. Therefore, the service of the notice cannot be disputed even for a moment.

31. In above view of the matter, there is no merit in the present revision petition, and therefore the petition requires to be dismissed.

32, For the foregoing reasons, this Revision Application is dismissed and the judgment and orders of the two Courts below are confirmed. The petitioner is on bail and his bail bonds are cancelled. The petitioner, therefore, shall surrender to custody forthwith. The office shall transmit the record and proceedings, and copy of the order to the trial Court immediately, so that the trial Court may issue non bailable warrant to the accused, and notice to the surety in order to enable the petitioner to serve out the remaining sentence. Rule is discharged.

(D.P.Buch,J.)

stanley-dpb.